

# The Chronicle of Higher Education

May 7, 2009

## Is Tenure Denial a Fair-Pay Issue? Federal Judge Says Yes

By [ERIC KELDERMAN](#)

When President Obama signed a new law in January that expanded workers' rights to sue for discriminatory pay inequities, some higher-education legal experts predicted the measure would have little effect on colleges.

But a recent ruling by a federal judge in Mississippi could change that drastically by widening the areas covered by the law, the Lilly Ledbetter Fair Pay Act of 2009, to include decisions on tenure.

"University lawyers may never have considered that the Ledbetter law, which was directed at compensation disparities, could rear its head in the tenure context," said Lawrence White, a legal consultant and a former university counsel at Georgetown University. "I think this decision will cause a stir."

The Ledbetter Act allows employees to file a lawsuit within 180 days of any discriminatory paycheck, including their final check as an employee, under Title VII of the Civil Rights Act of 1964, which outlaws workplace discrimination based on race, color, national origin, religion, and sex.

The [act's approval](#) was a direct response to a 2007 U.S. Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.*, which held that such suits could be filed only within 180 days after an employer made the initial decision to pay a worker less for discriminatory reasons—because of that person's gender or skin color, for example. In that case, the court ruled that Ms. Ledbetter, who had worked at Goodyear for nearly 20 years, filed her claim too late because she did not discover that she had been paid less than her male counterparts until after she retired.

The law amends the statute-of-limitations language in Title VII and other federal statutes, effectively overturning the Supreme Court ruling.

It was not expected to have much impact on colleges, however, even though the salary differences between men and women in academe are well known and documented. That's because compensation procedures for faculty members are so tightly monitored and because, in public institutions, salary information is open to public scrutiny, making it hard for employees to claim that they were unaware of discriminatory pay until the end of their career.

### The Link Between Tenure and Pay

But the case of Laverne Gentry, whose lawsuit against Jackson State University is pending in the U.S. District Court in Jackson, Miss., could substantially broaden the interpretation of the law to include employment actions indirectly related to pay.

Ms. Gentry sued Jackson State in 2006, two years after it denied her tenure and well beyond the 180-day statute of limitations that applied under the U.S. Supreme Court's *Ledbetter* decision and a decision in a 1980 case, *Delaware State College v. Ricks*.

Last month, in response to a motion by the university to have the suit dismissed because Ms. Gentry had filed too late, Senior District Judge Tom S. Lee ruled that Ms. Gentry's complaint came under the scope of the 2009 Ledbetter act because the tenure decision had denied her a salary increase and "hence was a compensation decision."

Judge Lee's ruling was not a final decision in the case, but it allows the lawsuit to proceed. The judge ruled in the university's favor, however, on other motions, dismissing Ms. Gentry's claims of retaliation and intentional infliction of emotional distress.

Ms. Gentry is still listed as an assistant professor in the university's College of Education and Human Development.

### **Weighing the Impact**

Legal experts differed on the significance of Judge Lee's ruling.

Hans Bader, counsel for special projects at the Competitive Enterprise Institute, a public-policy group in Washington, said the judge's reasoning relied on an ambiguous reference in the Ledbetter Act to "other practice" and was contrary to Congress's intent in passing the act.

An analysis of the legislation by the law firm of Morgan, Lewis & Bockius says Congressional debate included assurances that the term "other practice" did not apply to "promotion, hiring, or termination decisions that impact compensation levels only indirectly by affecting the position an employee holds."

But Martha S. West, an emeritus professor of law at the University of California at Davis School of Law, applauded Judge Lee's ruling, saying it would allow academic employees to file discrimination lawsuits after leaving their jobs, rather than having to risk retaliation by going to court as employees. (Normally, after tenure is denied, faculty members are given a one-year appointment.)

An interpretation of the Ledbetter Act that allows employees "to wait and begin the federal-lawsuit process after they have left work will make the process less emotionally draining on a day-to-day basis," Ms. West said. "They won't have to walk into their place of employment every day with the badge of 'litigator' or 'troublemaker,' which their employer has now assigned to them."

Judge Lee's ruling, however, could be overturned on a later appeal because it conflicts with the Supreme Court's 1980 decision in *Delaware State College v. Ricks*. That decision held that faculty members had to file Title VII lawsuits within 180 days of being rejected for tenure.

Ann H. Franke, another higher-education legal consultant, also warned against reading too much into Judge Lee's ruling.

"This is just one federal district court, looking at an unusual set of facts," Ms. Franke said. "My guess is that this ruling will have little impact on courts elsewhere and may itself be overturned on appeal." For universities, she said, "while the trend is definitely worth watching, I don't see the sky falling."